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Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 223.

JOSEY UNDERWOOD AND WARNER UNDERWOOD, BY THEIR NEXT FRIEND, FANNY U. GRIDER AND W. H. CUNDIFF, ADMINISTRATOR OF JAMES H. R. CUNDIFF, DECEASED, *Appellants*,

vs.

HARRIETT J. DUGAN, W. P. DUGAN, DANIEL D. DUGAN, GEORGE SHANNON, WILLIAM M. SHANNON *et al.*, *Appellees.*

BRIEF FOR APPELLANTS.

W. HALLETT PHILLIPS,
For Appellants.

R. O. Polkinhorn, Printer.

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Brief for Appellants.

The Bill.

The original bill was filed by appellants on the 13th day of June, 1881.

It charges that on the first day of March, 1838, the Republic of Texas caused to be issued to one Phineas Robinson, by the name of Fines Y. Roberson, a certificate for a league and labor of land.

On the 5th day of March, 1838, Phineas Y. Robinson, for value, sold, assigned, and delivered, the certificate to Warner L. Underwood, by a written transfer endorsed on the back of said certificate in the following words:

> "For value received I assign and convey unto Warner L. Underwood the within certificate, as per deed, also of the date of March 5th 1838.
> (Signed.) PHINEAS Y. ROBINSON.
> Teste:
> GEO. ALLEN,
> OSCAR ENGLEDANE,
> H. B. DANCE."

That on the same date, and for the express consideration of five thousand dollars, the deed referred to in said transfer was made by said Robinson to said Underwood; the deed containing a reservation in favor of one Joshua Robbins for one-half of the league conveyed, to whom, said deed recited, one-half of the league had been previously conveyed.

The deed authorized Underwood to procure a patent for the land, in his own name, and was signed, as witnesses, by the same persons who witnessed the transfer of the certificate.

On the 16th day of March, 1838, one of the subscribing witnesses to the deed proved it for record, and it was duly recorded on the 15th day of June, 1838, in the county of Milam, in said Republic.

On the 12th day of November, 1855, the clerk of the court, in which said record was made, made a certified copy of said deed which was afterwards filed in the General Land Office of the State of Texas.

After said copy was made, the records from which it was taken were destroyed by fire.

The bill charges that the land certificate was subsequently placed, by Underwood, in the hands of J. P. Dumas for location, and that it was located on public land in Grayson County, Texas; that Dumas fraudulently failed to do the acts necessary to secure the location, and permitted said land to be appropriated by another certificate.

That Dumas confederated with Dennis Trammel and Squire W. March to cheat and defraud Underwood and Robbins, first concealed the transfer endorsed on the certificate, and forged, or fraudulently procured from said Phineas Y. Robinson, a transfer of said land certificate to Dennis Trammel, who pretended to convey it to Squire W. March.

The bill charges that said March, having so acquired possession of the land certificate, caused it to be located upon the tract of land lying in Montague County, Texas, described in the bill, and caused the land certificate and field notes, and the transfer from Robinson to Trammel and from Trammel to March, to be filed in the General Land Office of the State of Texas; the transfer of the land certificate to Underwood, endorsed on the back of the certificate, having been first completely concealed from view by having a sheet of brown paper pasted over it; that the Commissioner of the General Land Office of the State of Texas, having been deceived with regard to the ownership of the certificate, by the means aforesaid, wrongfully issued, and delivered to said March, a patent for said land.

Complainant Cundiff, as purchaser, and Jose Underwood and Warner Underwood, as heirs of Warner L. Underwood, have acquired, and now own, the interest in said land certificate acquired by the said

Warner L. Underwood and Joshua Robbins, except an undivided interest of 1-16 of the league, which is owned by the defendant A. M. Robbins, as an heir of said Joshua Robbins.

The transfer and deed from Phineas Y. Robinson to Warner L. Underwood were attached as exhibits to the bill, and read as evidence on the hearing. (R., pp. 11 to 34 inclusive.)

Evidence to establish who were the heirs of Underwood and Joshua Robbins, in order to complete the claim of title, appears on pages 90, 91, 99, 168.

Robinson, the grantor of the land certificate, after its transfer to Underwood, removed from the State of Texas and never afterwards asserted any claim to the land or certificate, until, at the instigation of Dennis Trammel, he conveyed it a second time to him, if indeed the pretended second conveyance was genuine. (R., 4.)

At the date of the transfer of the certificate to W. L. Underwood, he lived in Texas. Shortly afterwards he went to Kentucky, intending soon to return to Texas. Business and ill health prevented his return, and he died in Kentucky in the year 1872.

Underwood was not made aware of the wrongful transactions with regard to said land certificate until about the 15th day of May 1860, when he was informed, through a letter written to him from Milam County, Texas, that his certificate had been found in the land office, at Austin, Texas, with the transfer to him, endorsed thereon, concealed by the means before stated, and that a patent had been issued to Squire W. March for the land in Montague County on which the certificate had been located. (R., 7.)

The bill charges that the war between the States obstructed and delayed the prosecution of suits in Texas, and that before the courts in Texas had been fully reopened, said Underwood died in the State of Kentucky, and that the heirs to whom his estate descended were then, many of them, minors and married women.

Complainants prayed that the title of all the defendants, except Robbins, be declared to be held in trust for them, and that they have partition with the defendant Robbins. (R., 10, 92.)

The defendant Robbins appeared (R., 79) and a decree *pro confesso* as to him was entered. (R. 80.)

The Answers.

The other defendants answered, denying, substantially, all of the allegations contained in the bill. (R., 65 to 70.)

They averred that S. W. March was an innocent purchaser for value of the certificate. (R., 70.)

That the Dugan defendants were innocent purchasers for value, under March, of 1,343 acres of the land particularly described. (R., 71.)

The defendants pleaded that under the two years statute of limitations they became the owners of the land certificate. (R., 71.)

They pleaded the statute of limitations of three, five and ten years, and also that the demand of complainants was stale. (R., 70, 71, 72.)

They also pleaded valuable improvements, in good faith.

The Decree.

The bill was dismissed on the ground of laches and the lapse of time. (R., 101.)

The reasons of Judge McCormick are found in the record. (99.)

Assignment of Error.

Appellants submit that the court erred in the following particulars:

1st. In holding that complainants had been guilty of laches, such as to forbid their recovering the land sued for, and in rendering a decree dismissing their bill.

2d. In concluding that S. W. March was an innocent purchaser for value, and that he had as such paid taxes upon the land and caused valuable improvements to be placed thereon.

3d. In holding that the delay of complainants, and those under whom they claim, was not sufficiently accounted for and excused.

4th. In not rendering a decree for the complainants as prayed for in their bill.

The Evidence.

In addition to the written evidence of title, and their proof of heirship, the complainants introduced evidence as follows:

Under an order of court they withdrew from the General Land Office the original land certificate is-

sued to Phineas Y. Robinson and established the genuineness of the transfer thereof, endorsed on the back of the certificate to Warner L. Underwood.

This proof was made by proving the handwriting of the subscribing witnesses, and by showing that the transfer itself was in the handwriting of Warner L. Underwood. And also by proving the signature of Phineas Y. Robinson, and his declaration that he had sold the certificate. (R., 143, 146, 149, 150, 151, 153, 154, 159, 160, 190, 191 and 247.)

They proved that Warner L. Underwood was in Texas in 1838, engaged in speculating in lands, and that about that time he went to Kentucky, intending soon to return to Texas; that the death of his father-in-law, in 1838, made it necessary for him to abandon his purpose of moving to Texas; that he claimed to own lands in Texas from the time of his visit there until his death, which occurred in Kentucky in the year 1872; that his title papers "were given by him to a man named Robinson, in Texas, who claims to have lost them when crossing a river in Texas; he, being a horseback. and having the papers in a pair of saddle pockets, dropped them in the river."

His heirs were married women and minors. (R., 168 and 169.)

The land certificate was probably among the papers lost. It was proved that it was in the year 1852 located in Grayson County, and that the location became invalid through the contrivance of J. T. Dumas, who caused other certificates to be located on the Grayson County land. (R., 170 and 171.)

Dumas afterwards told the witness, Smith, that a friend of his secured the forfeited land in Grayson County, and that he, in August, 1853, pasted brown

paper over the certificate, concealing the transfer to Underwood endorsed on it.

Shortly after the last transaction the certificate is found in the hands of Dennis Trammel, who is described as, "a shrewd, tricky, and unreliable man." (R. 190, 194, 231.)

In 1855, according to the evidence of Bradshaw, who was a brother-in-law of Dennis Trammel, Phineas Y. Robinson, at the house of said Bradshaw, in the County of Sevier and State of Arkansas, signed a transfer conveying to Dennis Trammel all the interest that Robinson then had in the certificate. (R., 166.)

The witnesses to this transfer were Bradshaw and David Trammel, a brother of Dennis. (R. 74.)

Three of the children of Robinson, who lived at the time in Sevier County, Arkansas, swear to their knowledge of the handwriting of their father and, to their belief, that the signature to the transfer to Dennis Trammel, was not the genuine signature of their father. (R., 232, 234, 236.)

Bradshaw testifies that Robinson signed it. (R., 163.)

The land certificate was transferred by Dennis Trammel to S. W. March by a general warranty deed on the 23d day of June, 1855, for the expressed consideration of one thousand dollars. (R., 76.)

The land in controversy was patented to S. W. March, under these transfers, on the 8th day of August, 1855. (R., 43.)

By the evidence of the Chief Clerk and that of an Assistant Clerk of the General Land Office of the State of Texas, in 1855, and at the time that S. W. March caused the land certificate with his

field notes to be filed in said office for patenting, it conclusively appears that the transfer to Warner L. Underwood, then endorsed on the certificate, was cancelled by having the brown paper pasted over it. (R., 223 to 228.)

The evidence of these witnesses shows their reasons for saying that the transfer was concealed by the brown paper, when the certificate was filed in the General Land Office, and also the means there resorted to by which the fraud was discovered after the patent to March had been issued.

The defendants made no effort to explain the fraud nor to show that March was deceived or misled by the concealment of the transfer.

On the contrary, they relied on disproving that there was any transfer endorsed on the certificate, or any paper so pasted on it as to conceal a transfer at the date of its purchase by S. W. March, or at the date of its being filed in the Land Office by him.

S. W. March purchased the certificate from Dennis Trammell through the agency of his brother, A. M. March.

The testimony of A. M. March is found on pages 180 to 185 of the record.

He testified on that point as follows:

> "At the time I bought said certificate there was no transfer on it to Warner L. Underwood or any one else. There was no brown paper attached or fastened to said certificate in any way. My means of knowing is from having it in my hands and examining it closely. There was no paper or any other substance attached to said certificate so as to conceal or cover any transfer, endorsement, or anything else, thereon." (R., 182 and 183.)

William Howeth located the certificate for March, upon the land in controversy, and received in payment a part of the land.

(It is through him that the Dugan defendants claim a specified part of the land.) He testified as follows:

> "I further positively say that at the time the Finesse Robinson certificate left the surveyors office at Gainsville, Cooke County, with the field notes to the land in controversy, and was given to A. M. March, for S. W. March to take or send to the General Land Office, in the year 1855, there was no transfer indorsed on said certificate to Warner L. Underwood, and that at said time there was no piece of paper, or any other substance, so attached or fastened to such certificate as to cancel or obscure any indorsement thereon." (R. 217.)

The deposition of Squire W. March was taken and read in evidence. (R., 208 to 210.)

With regard to the land certificate in controversy he said:

> "I did not see it upon its location. The first time I saw said certificate, which was in 1856 or 1857, it had no paper pasted on its back, except a yellow paper which had the file marks of the land office and was only attached at the top of said certificate.
>
> "It appears to have been done by the commissioner, or clerk filing the same in the Land Office.
>
> "The second time I saw said certificate (about the year 1874) it had the same yellow file paper tightly and nicely pasted all over its back, and through said paper a vestige of writing can be discovered by holding it up to a strong light.

"I did not alter or change the said certificate, nor authorize nor request any person to alter or change the same either by writing upon it or pasting paper over it or in any otherwise.

"The first time I saw said certificate, there was not any writing upon its back. I examined said certificate for the purpose of having my patent corrected, and I know that there was not any transfer or writing upon it; and I saw Stephen Crosby examine it, and saw no writing on the back of said certificate or the attached yellow paper, save the file marks on the yellow paper. The yellow paper already referred to was only attached slightly at the top of the certificate the first time I saw it.

"The second time I saw it, it was closely attached all over the back of the certificate, and very clearly shows that it was not attached by accident but by means of paste or mucilage."

Underwood seems to have been seeking the certificate, but to have been ignorant of all the transactions with regard to it until the 15th day of May, 1860, when the letter on the subject was written to him from Texas by one James Jeffries.

This letter is copied in full in the record (33 and 34) and describes the condition of the certificate and transfer when discovered by the writer.

Complainants proved that Warner L. Underwood was partially paralyzed for about four years previous to his death, in 1872, and this affected his mind to some extent. (R., 152.)

The defendants utterly failed to establish their pleas of limitations.

The evidence on this branch of the case will be found from page 118 to page 153 of the record.

The possession claimed by defendants was through tenants holding under written leases, which were in evidence.

The record contains no evidence of an actual adverse possession of the land previous to the death of Warner L. Underwood in 1872. A possession taken subsequent to that date would not start it running against minors and married women.

The first lease was to Norton and dated March 8, 1873. It was a five years lease of 160 acres of the Thomas Scott survey. (R., 97.)

Another lease was to John Horton, and dated January 1, 1874. It was a five years lease of 640 acres in the Thomas Scott and Fines Robinson surveys.

Another lease was to A. K. and J. B. White, dated March 21, 1873, for five years, and for 400 acres of the Thomas Scott survey. (R. 95.)

Another lease was to J. M. Crow, dated January 1, 1878, for five years and for 175 acres of land. (R., 96.)

These four leases were all that were introduced to prove limitations.

A number of witnesses testify to occupancy under these leases. They make the occupancy of the tenants begin from 1872 to 1874. They speak, in a general way, of its having continued for nine or ten years at the time the depositions were given—a date subsequent to the suspension of limitations by the institution of the suit by complainants.

There is no evidence of the payment of any taxes upon the land, or of five years possession under deeds duly recorded. (R., 106, 110, 112, 115, 119, 122, 125, 128.) The evidence is, that the Dugan part of the

land was never occupied. (R., 124.) The evidence of the witnesses, with regard to possession, shows that the only valuable improvements put upon the land consist of tenement houses and fencing, and that such improvements were paid for by the use of the land for part of the time. These witnesses were all favorable to the defendants, and place the land low, unimproved, and very high as improved.

They testify that in addition to placing the improvements on the land, in part payment for its use and occupancy, they paid March and his successors rent, but fail to answer questions as to the annual rental value of the land. (R. 110 to 140.)

Limitations.

Title to a land certificate in Texas cannot be acquired under the two-years' statute of limitations.

Shinn vs. *Hicks*, 68 Texas, 282.

The Supreme Court of Texas, in the case of *Reed* vs. *West*, 47 Texas, 249, say:

> "The fact that the contract was of ancient date, constitutes no valid objection to its enforcement either in law or equity."

And, again:

> "Surely it cannot be doubted that during the suspension of the statute of limitations equity will follow the law, and will not, unless it be for some equitable cause, hold a complainant guilty of laches because of his failure to file his bill during this interval." (Ib., 248.)

And see *Merrill* vs. *Roberts*, 64 Tex., 444.

Sec. 43 Art. 12 of the Constitution of Texas, adopted in 1869, reads :

> "The statutes of limitation of civil suits were suspended by the so-called act of secession of the 28th of January, 1861, and shall be considered as suspended within this State, until the acceptance of this constitution by the United States Congress."

This acceptance occurred on the 30th day of March, 1870.

Lapse of Time.

The Supreme Court of the United States observe, in the case of *Meader* vs. *Norton*, 11 Wall., 458 :

> "Laches and the statute of limitations are set up in argument, but such defences cannot prevail where the relief sought is grounded on a charge of secret fraud, and it appears that the suit was commenced within a reasonable time after the evidence of the fraud was discovered."
>
> And see *Kirby* vs. *Lake Shore Railroad*, 120 U. S., 136.

In the leading case of *Prevost* vs. *Gratz* (6 Wheat., 497), Justice Story says :

> "It is certainly true that length of time is no bar to a trust clearly established ; and in a case where fraud is imputed and found, length of time ought not, upon principles of eternal justice, to be permitted to repel relief."

The same court, in the case of *Michaud* vs. *Girod*, (4 How., 560), say :

> "In a case of actual fraud, courts of equity give relief after a long lapse of time. In general, length of time is no bar to a trust clearly established to have once existed, and where fraud is imputed and proved, length of time ought not to exclude relief. * * There is no rule of equity which excludes the consideration of circumstances, and in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the life time of either of the parties upon which the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."

The actual number of years which will operate as a bar will materially depend on the relative circumstances of the parties, and the particular features of every case, it being a matter particularly in the discretion of the court, to grant or withhold assistance.

Bryan vs. *Kales*, 134 U. S., 135.

The court below took judicial notice of the fact that "public land matters were in an unsettled condition for nearly ten years after 1838, and from the 28th day of January, 1861, to the 30th day of March, 1870," and concluded that the evidence established that, for at least two or three years prior to his death in 1872, "Underwood's mental condition was such as disabled him from giving due care to his business affairs."

The court accepts the undisputed evidence that Underwood was not informed of the fraudulent and adverse proceedings with regard to his certificate, until the year 1860. (R., 100.)

The letter to him from his agent, Jeffries, makes it evident that he was not in fact earlier informed.

But a few months elapsed before the civil war practically closed the courts of Texas. Before the 30th day of March, 1870, when they were again recognized to be open so as to demand diligence, the diseased mental condition of Underwood supervened, and continued until his death cast the title and devolved the duty of instituting suit upon his heirs, who were principally married women and infants.

We do not think that the defense of stale demand, sometimes applied because the actors in the transaction are dead, can be properly invoked in this case on behalf of the defendants and against the complainants.

The defendants have not suffered from that cause by the death of Trammell.

The subscribing witness to his part of the transaction was living and testified favorably to his claim.

S. W. March, and the agent through whom he dealt, lived long enough and were so fortunate as to get their version of their own transactions in evidence in the case.

It is the complainants only who, by the deaths of Underwood and Robinson, suffer from that cause.

The evidence shows that March paid one thousand dollars for the certificate, but it also shows that he has received a much greater sum from the use of the property, and if not already fully reimbursed and protected, he may still have the money expended by him, made a charge upon the property and be reimbursed.

Disability.

Art. 3198 of the Revised Statutes of Texas reads:

> "If a person entitled to commence suit for the recovery of real property, or to make any defense founded on the title thereto, be at the time such title shall first descend or the adverse possession commence—1. Under twenty-one years; or, 2. A married woman; or, 3. Of unsound mind; or, 4. A person imprisoned. The time during which such disability shall continue shall not be deemed any portion of the time limited for the commencement of such suit, or the making of such defense, and such person shall have the same time, after the removal of his disability, that is allowed to other persons by the provisions of this chapter."

By reference to the deposition of Mrs. Gider (R. 168), it will be seen that, at the date of the death of Warner L. Underwood, in 1872, all of his children and heirs were either married women or minors, except his son, Warner; and that Warner died in 1874, leaving surviving him his widow, who died in 1881, and two children.

She was, under the laws of Texas, heir to an estate for her life of one-third in her husband's interest in the land with remainder to the two children of said Warner. The two children inherited the other two-thirds as well as the remainder, after the expiration of their mother's life estate. They were then minors and continued under that disability until, by their next friend, they joined in bringing this suit.

One son of Warner L. Underwood, John, reached his majority in 1874. (R., 168.)

The disability from coverture of the married daughters ceased, when they sold and conveyed their interests to W. H. Cundiff.

Mrs. McCann's deed was made in December, 1879. (R., 24.)

Mrs. Western's was made in May, 1880. (R., 26.)

The deed of the other heirs was made in May, 1880. (R., 21, 22.)

Bona Fide Purchaser.

The opinion of Jndge McCormick, before whom the cause was heard (R. 99), shows that in his judgment, the title of complainants through Warner L. Underwood, was made out.

He gave judgment against them upon the following, among other, considerations:

> Because the proof showed that S. W. March had no actual knowledge or notice of the transfer to Underwood."

Upon the issue of *bona fide* purchaser, it is important to bear in mind that, in Texas, an unlocated land certificate, has always been held to be personal and not real property. The certificate was unlocated when March purchased it, and was a chattel merely. He purchased such title as his vendor held. His vendor had only a quit claim from a party who had no title.

Hearne vs. *Gillett*, 62 Texas, 23;
Porter vs. *Barnett*, 60 Texas, 220.

S. W. March's deposition was read, as were also the depositions of his brother, A. M. March, who

purchased the certificate for him and William Howeth, who located it for him.

How much credit is due to the testimony of these witnesses may be determined by considering their evidence in one aspect.

Their plan of attack upon plaintiffs title was to prove that the transfer to Warner L. Underwood, endorsed on the back of the certificate, was a forgery.

With that purpose in view, one and all of said witnesses, testified positively and unreservedly that when the certificate was purchased by March, as well as when it was located, it had no paper pasted upon its back to conceal a transfer. Having none, they were able to know, and testify as they did, that the transfer to Underwood was not then endorsed upon its back.

They undoubtely supposed that owing to the death of Underwood, the grantee, and of Robinson the grantor, as well as the death of the three subscribing witnesses to the transfer, they could, by the positiveness of their assertions, destroy the effect of the transfer.

They did not, by their evidence, place S. W. March in the position the court gave him, of an innocent purchaser, because the brown paper concealed the transfer. On the contrary S. W. March and his witnesses testified that there was no paper on the certificate to conceal the transfer.

If it can be successfully contended that March was not bound by the transfer endorsed upon the back of his own title paper, it is yet difficult to conclude he ought to be given, in a court of equity, the position of innocence at the expense of the parties who

were defrauded. He declined in defense to protect himself on the plea of ignorance of the transfer, but chose rather, by assuming a knowledge that it was impossible for him to have, to swear that it did not exist. In so doing he took issue on the fact whether the transfer was actually on the certificate at the time of his purchase.

This issue has been found in favor of complainants

We submit that the decree should be reversed.

W. HALLETT PHILLIPS,
For Appellants.

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Counsel for Appellees.

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BRIEF FOR THE APPELLEES.

On March 2, 1838, there was issued by the proper authorities of the Republic of Texas to Finess Roberson a headright certificate for a league and labor of land. (11)

The certificate, under the laws of Texas, was personal property, and the title tnereto could pass by parol sale. On March 5, 1838, the grantee endorsed on the back of the certificate an assignment as follows:

"For value rec'd I assign and convey unto Warner L. Underwood the within certificate, as per deed, also of the date March 5, 1838."

PHINASS Y. ROBINSON.

Teste:
GEO. ALLEN.
OSCAR ENGLEDOW.
H. B. DANCE. (14)

On May 12, 1855, the certificate being in possession of Finess Roberson, and the transfer to Underwood being completely obscured and concealed by means of a piece of yellow or brown paper pasted over the back of the same, said Roberson, in consideration of seven hundred dollars,sold and assigned the certificate to Dennis Trammel by written transfer. (74) Dennis Trammel being in possession of the certificate and transfer in Austin, Texas, in June,1855, there met A. M. March,the agent and brother of S. W. March, who had sent him to Austin for the purpose of buying a league and labor certificate and instructed him to be sure to buy a valid certificate and a perfect title to the same. A. M. March had the certificate and Trammel's title examined by an attorney, who pronounced the certificate and title good. As a matter of further precaution, he submitted the certificate and Trammel's title to the Commissioner of the General Land Office, and that officer pronounced the certificate and Trammel's title valid, and said that if S. W. March would procure a transfer from Trammel, the patent would issue to him as assignee. A. M. March thereupon bought the certificate from Trammel, paying him one thousand dollars in cash—the full value of the certificate—and took an assignment to his brother, dated June 23d. 1855. Neither A. M. March, the attorney who examined the title or the Commissioner of the General Land Office had even a suspicion that a transfer was concealed under the yellow or brown paper. (76, 175, 206) S. W. March bought the certificate, intending to locate it on vacant public land as an investment. A few weeks after his purchase, he had the certificate located upon the land in controversy, had the field notes and certificate returned and filed in the general land office, and on August 8, 1855, procured a patent or grant thereon to himself as assignee of Finess Roberson. S. W. March paid the land office fees and all the expenses of the location and patent. (43)

Afterwards, on July 17, 1857, S. W. March conveyed 1343 acres of the land to Howeth & Twitty by deed in the usual form and containing the usual covenants of warranty, except at the end of the covenant the restrictive words "by, through or under me" occurred.

On October 5, 1860, Howeth and Twitty, by deed in the usual form

and containing the usual covenants of warranty, sold and conveyed the 1343 acres to George Dugan, who, without any notice of any defect in the title, paid them a valuable and adequate consideration for the land. (93) Dugan and his heirs have ever since claimed and paid taxes on the 1343 acres. S. W. March and his heirs have claimed and paid taxes on the remainder of the land ever since the issuance of the patent.

As early as the spring of 1872, and probably in 1871, S. W. March took actual possession of the remainder of the land by tenants, and improved and reduced a large portion of it to a state of cultivation, built tenant houses, and exercised other acts of ownership, and he and his heirs have ever since held actual possession of the land. He also built a costly residence upon the land and was preparing to move upon it and make it his home, when he died in 1878. (34) The heirs of S. W. March and the heirs of George Dugan and their tenants were the defendants in the court below and are the appellees in this court.

Warner L. Underwood exercised no acts of ownership over the certificate, and did not pay the taxes on either the certificate or the land. The Bill admits that in May, 1860, he knew the land had been patented to S. W. March, and that his agent in Texas knew the same fact the previous winter. (33) Underwood was not only a good business man, but an able lawyer, and lived until the 12th day of March, 1872. He left as his heirs his widow, Lucy Underwood, who was of full age, his daughters, Fanny Grider, who had been married since 1852, Juliett Weston, a widow of full age, Lucy McCan, who had been married since 1857, Josie Nazro, who had been married since 1870, and Mary Poyntz, born in 1857 and married in 1877, and his sons, Warner Underwood, Jr., born in 1845, Henry Underwood, born in 1848, and John Underwood, born in 1854. (168) Warner Underwood, Jr., died Oct. 16, 1874, leaving as his heirs his minor children, the complaintants, Josie and Warner Underwood and his widow, Ida Underwood, who has since died. (168)

The widow Lucy Underwood, Fannie Grider, Josie Nazro, Mary Poyntz and John Underwood conveyed to W. H. Cundiff on May 12, 1880, Lucy McCan conveyed to W. H. Cundiff Dec. 5, 1879, Juliet Weston conveyed to W. H. Cundiff May 17, 1880, Henry L. Underwood

conveyed to W. H. Cundiff June 4, 1880. Each of the above four deeds recited that the grantors had previously, on the 20th day of March, 1877, through their duly authorized agents, Miller & Dowell, conveyed the same land to said Cundiff. W. H. Cundiff conveyed to the appellant James R. Cundiff by warranty deed on Aug. 26, 1879. The bill admits that Warner L. Underwood had never been the owner of anything except a half interest in the land certificate, and that the other half belonged to Joshua Robbins. All of the latter's heirs conveyed to W. H. Cundiff on Nov. 21, 1870, except A. M. Robbins, who was made defendant to the Bill. James R. Cundiff and the two minor children of Warner Underwood, Jr., were the only plaintiffs in the Bill, and they claim through Warner L. Underwood, Sr., and Joshua Robbins as above stated, and the Bill was filed on June 13, 1881. They pray that the defendants be adjudged to hold the legal title, which was vested in S W. March by the patent issued to him on August 8, 1875, in trust for them.

II.

We contend that the decree dismissing the bill should be affirmed, because,

FIRST S. W. March having bought the certificate in good faith and for value and without notice of any prior assignment, and afterwards having located the certificate at his own expense and procured the patent thereon to himself is protected under the maxim: "Where the equities are equal, the law must prevail."

SECOND—S. W. March and his heirs having held adverse possession of the land under patent from the state for more than three years prior to the filing of the bill are protected under Article 3191 of the Revised Statutes of Texas, which provides:

"Every suit to be instituted to recover real estate as against any person in peaceable and adverse possession thereof under title or color of title shall be instituted within three years next after the cause of action shall have accrued, and not afterwards." And by Article 3192, which

provides:

"By the term title, as used in the preceding Article, is meant a regular chain of transfer from or under the sovereignty of the soil."

THIRD The complainants' rights, if any, and their cause of action, if any, having accrued to them upon the issuance of the patent to March, on the 8th day of August, 1855, more than twenty-five years prior to the filing of their bill, their claim is a stale demand under the rule which has always obtained in Texas that suits based upon equities must be brought within ten years after the accrual of the cause of action.

FOURTH As to the 1343 acres claimed by the heirs of George Dugan, said heirs are protected because their ancestor was a *bona fide* purchaser for value of the legal title vested in S. W. March by the patent and cannot be disturbed.

The evidence conclusively shows that S. W. March was a *bona fide* purchaser and paid the full market value of the certificate. It was no mark of suspicion that a land certificate seventeen years old should have a brown paper pasted over its back apparently for the purpose of preserving it. The paper did not excite the suspicion of the agent, A. M. March, or of the attorney or of the commissioner of the land office, who examined the certificate, nor did it excite the suspicion of William Howeth or W. C Twitty, who located the certificate for March and who were interested in it to the extent of a locative interest. The able District Judge who has had long experience with the land system of Texas and who had the original certificate before him believed, as will be seen from his opinion, that S. W. March acted in good faith. Negligence or fault, therefore, cannot be attributed to him. The law does not require that a man should suspect a "bug" under every "chip." But if Underwood and Robbins had a valid prior assignment to the certificate, and fault or negligence could not be attributed to them for permitting Finess Roberson to retain or re-acquire possession of the certificate and thus clothe himself with the appearances of ownership and mislead an innocent purchaser, they could have recovered the certificate of S. W. March under the rule that where the equities are equal the first in point of time is prior in

. March's rights do not stop with his purchase of the cer-
ith. He went further—located the certificate upon va-
his own expense procured a patent thereon to himself
his equity the legal title. By his acts and diligence and
re of his money, a mere chattel or chose in action worth
llars has ripened into title to land worth, with its im-
thousand dollars. His equities are at least equal, if not
ving drawn to his equity the legal title the case falls
e rule that where the equities are equal the law must

Corcoran, 17 How. 612, furnishes an apt illustration of
Williams had assigned a claim upon the government
The last purchaser gave notice of his assignment and
cher or warrant for the claim in his own name. It was
eby acquired the best right to the fund.
re 62 Tex. 610 is a case very nearly in point. March
as a purchaser of the legal title the same as if the
tented to Trammel or to Roberson and he had after-
he patentee.
tached to the bill, as an exhibit, what purports to be a
m the deed records of Milam county of a formal assign-
ficate from Roberson to Underwood dated March 5th,
ed in Milam county on June 15th, 1838. This record is
was no law authorizing the record of a transfer of an
rtificate and no law making such record constructive no-
t purchasers. A copy from this void and unauthorized
lence of any right.
vs. Morell, 68 Texas 382.
n vs. Chapman, 45 Texas 560.
question is located in Montague county. In 1838, when
ed to Underwood, Roberson resided in Houston county,
55 when he sold to Trammell he resided in Sevier
. No argument is necessary to show that it would be

folly to expect a purchaser to examine the records of Milam county for prior transfers of the certificate.

It is charged in the bill that the assignment from Roberson to Trammell was merely a quit-claim, and from this the conclusion is sought to be drawn that Trammell's title was such upon its face as to excite the suspicion of March and prevent him from being a *bona fide* purchaser. If the premises should be admitted, the conclusion would not follow; but the assignment is not a quit-claim. The certificate being personal property, a warranty of the title is implied in the sale of it. But the assignment contains this language: "I do bargain, sell and convey unto Dennis Trammell my right and title in and to my headright certificate (describing the same) and by these presents do bargain, sell and convey said headright certificate to him, the said Trammell, his heirs and assigns, forever. To have and to hold from me and my heirs, forever; and I desire and authorize the commissioner of the land office to patent said certificate to said Trammell or his assignee." (74). Article 557 of the Revised Statutes of the State of Texas provides: "From the use of the word "grant or convey in any conveyance by which an estate of inheritance or "fee simple is to be passed the following covenants and none other on "the part of the grantor for himself and his heirs to the grantee, his heirs "and assigns are implied unless restricted by express terms contained in "such conveyance.

"FIRST—That previous to the time of the execution of such convey-"ance the grantor has not conveyed the same estate or any right, title or "interest therein to any person other than the grantee.

"SECOND—That such estate is at the time of the execution of such "conveyance free from incumbrance." The following authorities show that the assignment is not a quit-claim and bears no resemblance to a quit claim.

Garrett vs. Christopher, 74 Texas, 453.
Harrison vs. Boring, 44 Texas, 255.

The contention is that the transfer was so unusual in form and so

suspicious on its face as to alarm a purchaser and deter him from buying from Trammell. The position is too absurd to require serious notice. Should the appellants, however, be able to break over here, we will reach the defense of three years' limitation under the Statutes of Texas.

A patent issued to one as assignee, though he be not in fact the owner of the certificate or even if issued upon forged transfers, is title within the meaning of the Statute.

League vs. Rogan, 59 Texas, 427.
Burleson vs. Burleson, 28 Texas, 417.

Adverse possession has been continuous since 1872, and more than three years prior to the filing of the bill S W. March built a costly residence on the premises. It is admitted that one-half of the certificate has always been owned by Joshua Robbins and those claiming under him and that this interest was conveyed by Robbins' heirs in 1870 to W. H. Cundiff, who afterward conveyed to the complainant, James R. Cundiff. That half interest is therefore unquestionably barred. "If a person entitled to commence suit to recover real or personal property or to make any defense founded upon title thereto, be at the time such title shall first descend or the adverse possession commence under the age of twenty-one years, a married woman or a person imprisoned the time during which such disability shall continue shall not be deemed any portion of the time for the commencement of such suit or the making of such defense; and such person shall have the same time after the removal of his disabilities as is allowed to others by the provisions of this chapter." Revised Statutes of Texas, Article 3201.

It has always been held in Texas that disabilities cannot be tacked, but that only the disabilitywhich existed at the time the adverse possession was taken can be relied upon, and that when the Statute is once put in motion it cannot be thereafter suspended. Article 3225 of the Revised Statutes of Texas is as follows:

"The period of limitation shall not be extended by the connection of one disability with another; and when the law of limitation shall begin to run it shall continue to run, notwithstanding any supervening disability of

the party entitled to sue or liable to be sued."

French vs. Strumberg, 52 Texas, 92.
Hunton vs. Nichols, 55 Texas, 217.

We think the evidence will admit of the conclusion that S. W. March took adverse possession of the land in 1871, prior to the death of Warner L. Underwood, and, if so, that interest would be barred as limitation was not interrupted by his death. In the opinion, the District Judge finds that adverse possession was taken in 1872 without stating whether before or after the death of Warner L. Underwood, which also occurred in 1872. We will therefore present the case as if possession was taken in 1872 and after the death of Warner L. Underwood.

In 1838 at the time it is claimed that Warner L. Underwood acquired his interest in the certificate by purchase the Spanish law of community property was in force in the Republic of Texas, and he was then married to his wife, Lucy Underwood, who survived him. Under the law she was the owner of one-half of his interest, or one-fourth of the certificate, and she being of full age when adverse possession was taken that interest is barred.

Mrs. Weston was a widow of full age when her father died, and her interest is barred.

Henry Underwood reached his majority in 1869 and John in 1875, and their interest is barred.

Mary Poyntz was born in 1857 and was married in 1877, and being a minor when adverse possession was taken, limitation has been running against her since her marriage, and that interest is barred.

Under the laws of Texas a woman reaches her legal majority at marriage, although she may be under the age of twenty-one years.

Parish vs. Alston, 65 Texas 194.
Revised Statutes Art.

Mrs. Grider, Mrs. McCan and Mrs. Nazro were married women when adverse possession was taken, and the statute did not begin to run against their interest until they sold to W. H. Cundiff through whom the appellant, James R. Cundiff claims,but their deeds recite that they had

previously conveyed to W. H. Cundiff on March 20, 1877, which was more than four years prior to the filing of the Bill, and their interest is therefore barred. The remaining child, Warner L. Underwood, Jr., died in 1874, after adverse possession had been taken of the land, and his heirs, the complainants Josie and Warner Underwood, though minors, are, therefore, barred. It is, perhaps, needless to add that in Texas an action of trespass to try title, which is the local name for ejectment, can be maintained upon either a legal or equitable title, and that adverse possession bars an equitable the same as a legal estate.

The trial judge dismissed the Bill, among other things, because the claim was a stale demand. In this he is well sustained by authority.

Courts of equity are governed by the analogies of the statute of limitations of courts of law. *Norris vs. Haggins, 136 U. S. 386.* Texas at an early day adopted shorter periods of limitation than generally obtain elsewhere. The period is three years in case of possession of land under title or color of title; five years in case of possession under a recorded deed, and ten years if the party in possession has no title. In personal actions the period is one year for personal injuries, slander, libel, etc., two years in actions for the recovery of chattels or conversion thereof, and four years for actions upon written contracts. Ten years is the longest period allowed for the bringing of any suit whatsoever. The question has often risen in respect to the time allowed for the bringing of suits based upon equities in land where there has been no possession of the land by the defendant, who has the legal title, but merely an adverse claim or repudiation or denial of the alleged equity. These have sometimes been cases of express or implied trust, sometimes cases for specific performance of contracts, but usually cases like the present—suits against the patentee from the state by those claiming an older or superior right to the certificate upon which the patent was issued. The courts have with much reason held that the period of twenty years, which has elsewhere been generally adopted by courts of equity in harmony with the statute of limitations, should not apply in Texas because of the shorter periods prescribed for the bringing of legal action. Following the analo-

gies of the law, they have prescribed ten years as the time allowed for the bringing of actions based upon an equitable claim, which is the longest time allowed for the bringing of an action for the recovery of land for any other purposes.

Brown vs. Guthrie. 27 Texas, 610.
Carlisle vs. Hart. 27 Texas, 350.
McMasters vs. Mills. 30 Texas, 592.
Bulloch vs. Smith. 72 Texas, 545.
Montgomery vs. Noyes. 73 Texas, 203.
Fuller vs. Coddington. 74 Texas, 334.
Brown vs. Roberts. 75 Texas, 103.

This is, of course, a rule of property which the Federal courts respect and enforce the same at the state courts. On August the 8th, 1855, more than twenty-five years before the commencement of this suit, the state of Texas, through the proper authority, decided that S. W. March was the owner of the certificate and granted and patented the land to him, thus investing him with the legal title and clothing him with all the *indicia* of absolute ~~membership~~ ownership. This being a distinct and solemn repudiation of the claim of Warner L. Underwood to the certificate, his cause of action then accrued and he should have then sued. It is no answer to say as in the Bill, of which, however, there is no proof, that Underwood did not know of the claim of March or the issuance of the patent to him. As in Norris vs. Haggin, *supra,* the acts of March were not done in a corner. His field notes, evidencing his claim, were recorded in the county where the land lay. His transfers and field notes were filed with the certificates in the general land office, and there archived as public records open to the inspection of every one. The patent was the act of a public officer, and a copy was retained in the general land office for a perpetual memorial. Underwood, at least, knew that he was not in possession of the certificate evidencing the right to the land, and none but an inexcusably careless man would have delayed inquiry as to its whereabouts and disposition for twenty-five years, when inquiry at the general land office, where any sensible man would have applied for information, would at any time after 1855 have led to a

knowledge of the facts in the case and the patent to March. March also paid taxes on the land from the date of the patent, and this is also a matter of public record. Underwood could and should have sued in his lifetime, and this being true, his heirs, though some may have been laboring under disabilities, are only allowed the time which he would have been allowed had he lived, for whenever the statute begins to run, it is not interrupted by intervening disabilities.

But something is said in the Bill about the disturbed condition of the country furnishing an excuse for not suing. From August 1855, the date of patent, to the beginning of the civil war, it cannot be claimed that the courts were not open to litigants. From the readmission of Texas into the Union in March 1870, until the filing of the suit in June 1881, a period of more than eleven years, the country was not so disturbed that a citizen could not assert his rights in the courts. We can deduct the nine years from the beginning of the civil war to the readmission of Texas, and we have remaining seventeen years of perfect peace in which the courts were open to the complainants for an assertion of their supposed equities. But during the years 1866, 1867, 1868 and 1869 there was a *de facto,* if not a *de jure* government in Texas and her courts, state and Federal, were open and presided over by eminent jurists.

This case aptly illustrates the wisdom of the conservative rule which closes the courts to stale claims not prosecuted in due season. The appellants claim under an assignment which they assert was made in March 1838. The parties and the witnesses have been long dead. It can, therefore, only be established by proof of handwriting. The sale of the certificate may have been, and doubtless was, rescinded or never fully consummated. It was in Robinson's possession in 1855, and he then claimed the right to sell it. How came it in his possession? Did he have the right to sell it? These are questions that Roberson and Underwood could answer. But they are both dead. All of the parties to the sale from Roberson to Trammel are dead, except one subscribing witness. If Roberson had meditated a fraud, it seems he would have lost the origi-

nal certificate and obtained a duplicate, and thus no evidence of any previous transfer would have been preserved. Underwood did not sue for the land, neither did Robbins or the heirs of either of them.

It is evident from this that this suit would not have been brought had it not been for W. H. Cundiff, who, as a matter of speculation, bought this law suit for a mere trifle, hoping to enrich himself at the expense of others. He supposed that after the death of Roberson, Underwood and Robbins and all the witnesses to the various transactions, he could recover, provided he could prove the handwriting of the old transfer on the back of the certificate, and, in addition to this, could make the pretended letter from Jeffries to Underwood of May 1860, which would not be evidence in a kangaroo court, an exhibit to his Bill.

It seems to be too plain for argument that George Dugan, who bought S. W. March's title to the 1343 acres after the issuance of the patent to him, was a *bona fide* purchaser.

Lea vs Polk County 21 How., 493.
Wimberly vs Pabst. 55 Texas, 587.

We have been compelled to prepare this brief without seeing the brief of appellants.

No assignments of error were made or sent up with the record, and none have been filed in this court. Neither is there any bill of exceptions showing what, if any, objections the appellants have to the proceedings of the trial court.

Owing to this, we may have made this brief unnecessarily long, and may have discussed useless questions.

All of which is respectfully submitted.

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